

Youth Right to Counsel: History of Reforms and Opportunities Beyond *Gault*

Salmon P. Chase College of Law
In re Gault: 50 Years and Beyond
December 1, 2017



State Assessments of Right to Counsel

NJDC and the Central Juvenile Defender Center



Kentucky
(2002)

Ohio
(2003)

Indiana
(2006)



Advancing Justice: Access to Counsel and Quality of Representation in Delinquency Proceedings in Kentucky

Key Findings:

Kentucky's public defense system generally showed improvements since an initial report in 1996 showing significant structural deficiencies:

- ▶ Full time offices replaced contract systems in nearly all counties
- ▶ Substantial new funding was generated through the legislature
- ▶ The Juvenile Post-Disposition branch was created
- ▶ Increased focus on training for juvenile defenders improved quality

BUT:

- ▶ Caseloads remain too high, resulting in the inability of lawyers to adequately address the needs of clients;
- ▶ Disproportionate minority contacts created inequities in the juvenile system; and
- ▶ Youth with mental health needs still fared poorly in the system.

Kentucky: Key Advances in Right to Counsel

► Limited Waiver of Counsel

- Juvenile can waive right to counsel ONLY if he was first appointed counsel. *D.R. v. Commonwealth, Ky., 64 S.W.3d 292 (2001)*
- BUT *KRS 610.060(2)* later amended to permit waiver except in circumstances where court “intends to impose detention or commitment as a disposition...”

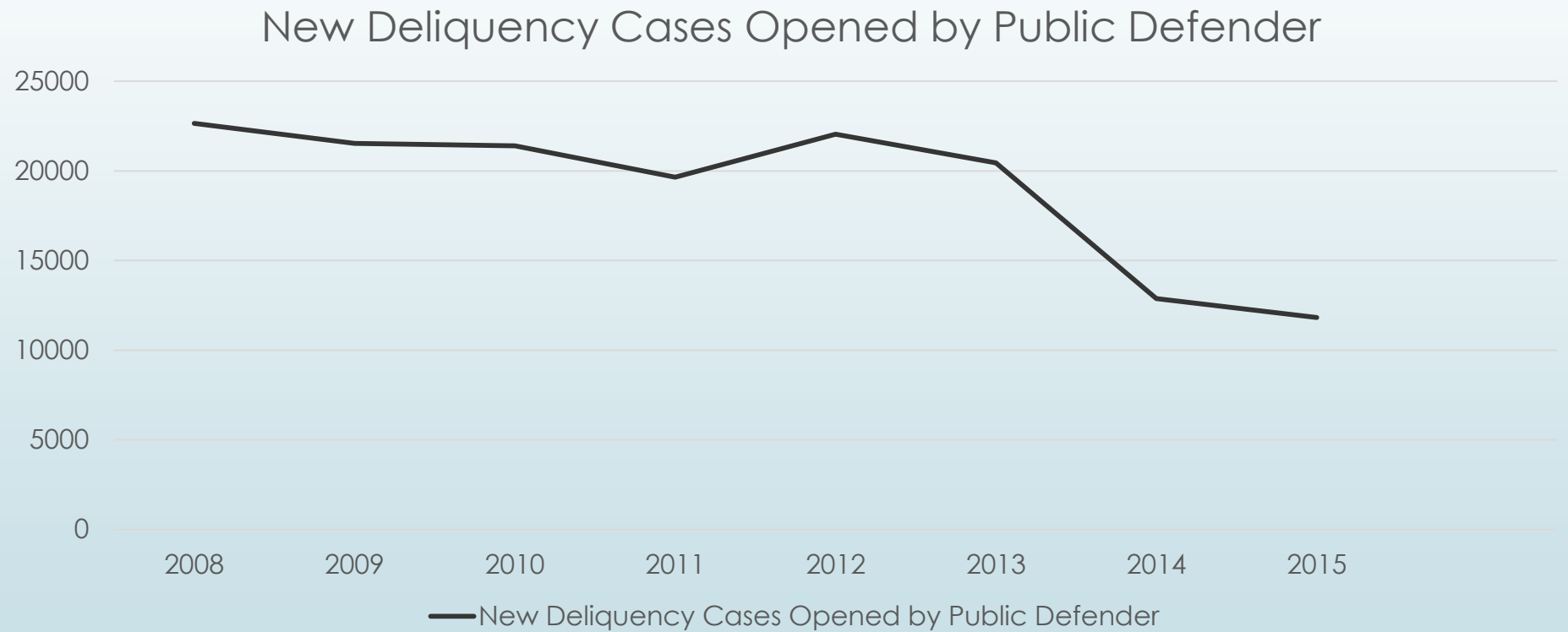
► Post-Disposition Advocacy

- DPA’s Juvenile Post Disposition Branch
- Statutory right to counsel at post-disposition proceedings including revocation of probation, appeals, and any “proceeding that the attorney and youth considers appropriate.”
- A minor, whether indigent or not, who is in custody of DJJ and is residing in treatment facility or detention is entitled to be represented on a legal claim related to confinement *KRS 31.110(5)*

► Protection During Interrogation

- Child is entitled to Miranda warnings before being questioned by school official in presence of law enforcement. *N.C. v. Commonwealth, Ky., 396 S.W.3d 852 (2013)*
- Best practice would require counsel at all interrogations of minors

Trend of Legal Counsel in Kentucky: Decrease in Caseloads After SB 200





Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Ohio

Key Findings:

- 1) Waiving of counsel occurred in high numbers, particularly in rural areas, and including in serious cases. It was not uncommon for youth to end up at DYS without having had an attorney.
- 2) Lawyers often applied a best interest standard in delinquency cases
- 3) No consistent mechanism for providing juvenile post-disposition services was available for youth who were incarcerated.
- 4) High caseloads, low pay, and lack of resources needed for litigation were common.
- 5) The state lacked leadership and oversight of juvenile defense functions.



Ohio: Key Advances in Right to Counsel

Restricting Waiver of Counsel:

- ▶ Changes to Juv. Rule 3 – youth must consult with an attorney before waiving the right to counsel in felony cases; youth must be advised of the dangers of self-representation; sets forth other requirements on the record for waiver.
- ▶ In re: C.S. – recognized the presumption of appointment of counsel and against waiver of counsel, at least in more serious cases.
- ▶ JDAI – incorporated requirement of lawyers at detention hearings in JDAI counties as a core component; led to early appointment in targeted counties

Post-Disposition Representation for Incarcerated Youth in State Facilities

- ▶ J.P v. Taft – access to the court litigation on behalf of youth incarcerated at DYS created the Legal Assistance Program, now incorporated into the Office of the Ohio Public Defender enabling statute

State Leadership on Juvenile Defense Issues

- ▶ Annual training for public defenders
- ▶ Convening of juvenile defense chief defenders
- ▶ Involvement in policy related issues relevant to youth in the delinquency system



Indiana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings

- ▶ The number of youth waiving counsel was significant, particularly in rural areas, and including many youth who ended up at the Department of Corrections never having been represented.
- ▶ Lawyers often used best interest representation when they were appointed.
- ▶ Many lawyers, particularly those in rural areas, were not well trained to handle juvenile defense cases.
- ▶ Appellate or other post-dispositional advocacy was limited and non-existent in most parts of the state.
- ▶ The lack of resources, high caseloads, and low compensation were deterrents to effective representation.
- ▶ The state lacked leadership and oversight in juvenile defense functions.

Indiana: Key Advances in Right to Counsel

Restricting Waiver of Counsel:

- ▶ Supreme Court enactment of Crim. Rule 25, restricting waiver of counsel without appointment of lawyer and consultation, with procedural safeguards set forth, in cases where out of home placement can occur.

Post-disposition Representation:

- ▶ Pilot project in DOC providing orientation about appellate rights and referring appropriate youth for appellate representation of Rule 60B motions.
- ▶ Increased amicus support on key issues.

State Leadership on Juvenile Defense Issues

OJJDP grant allows for:

- ▶ Enhanced JTIP training in rural areas
- ▶ Involvement in juvenile defense policy issues
- ▶ Technical assistance for juvenile defenders throughout the state with a listserve website, materials, briefs, and consultation



Unfinished Business: A Snapshot of Failure to Protect Right to Counsel

Eligibility for a “Free Lawyer”: Only 11 states guarantee regardless of financial status

All children in the United States are still not guaranteed lawyers

Kentucky: Kentucky has no presumption of indigence in juvenile court proceeding. Parents’ ability to pay is considered unless they are the victim of the crime or the complaining witness against the child. In practice, most Kentucky courts appoint attorneys for kids.

****Ohio:**

Youth are presumed indigent by law, but may not be consistently applied.

****Indiana:** Youth must be appointed counsel without regard to financial resources of the parent.



Unfinished Business: A Snapshot of Failure to Protect Right to Counsel

Early Appointment of Counsel:

Many children do not get attorneys until it is too late. No state guarantees it for custodial interrogations.

***Kentucky:**

Attorneys are in court whenever a child is before the court. At times, public defenders get called by police and schools to assist.

Ohio:

No consistent approach to appointing counsel at initial hearings, including detention hearings.

Indiana:

No consistent approach to appointment of counsel at initial hearings, although Crim. Rule 25 has helped, particularly with counsel at detention hearings.



Unfinished Business: A Snapshot of Failure to Protect Right to Counsel

Cost of Counsel: 36 states allow youth to be charged fees for a “free” lawyer. Children must pay for their constitutional right to a lawyer.

Kentucky:

Statute allows for the imposition of costs to parents. Can impose a flat fee of up to \$150 as a public defender fee. Rarely imposed.

Ohio:

An administrative fee of \$25 can be imposed for appointment of counsel.

Indiana:

Inconsistently applied among counties. Commission standards require counties to have guidelines for this but only in criminal cases.



Unfinished Business: A Snapshot of Failure to Protect Right to Counsel

**Waiver of Counsel: 43 states allow waiver without consultation with a lawyer
Children's Rights Are Not Safeguarded by the States**

Kentucky:

No waiver on any adjudication or plea in felony cases or other cases (including VCO) for which court intends to detain or commit.

Ohio:

Youth must consult with a lawyer prior to waiver, but only in felony cases.

***Indiana:**

No waiver under Crim. Rule 25 without consultation in cases where out of home placement is possible.

Bonus points: Only one of 3 states which keeps data on appointment rates.



Unfinished Business: A Snapshot of Failure to Protect Right to Counsel

**Post-Disposition Representation: only 11 states provide for meaningful comprehensive representation after disposition.
Children's Access to Counsel Ends Too Early**

****Kentucky:**

Explicit comprehensive right to post-dispositional advocacy for youth.
Also has state post-disposition unit within its public defender system.

***Ohio:**

Explicit right to access the courts through lawyers provided within the OPD enabling statute for fact, duration and conditions of confinement issues.
Has post-disposition unit within its public defender system.

Indiana:

Provides limited post-disposition representation by statute.



Extending Gault Principles

- ▶ **Right to Counsel in Civil Cases**
 - ▶ Bases for the Right
 - ▶ Need for Counsel
- ▶ **Role of Counsel for Children in Civil Cases**
 - ▶ Traditional Attorney
 - ▶ Guardian Ad Litem
 - ▶ Hybrid
 - ▶ Advocate
 - ▶ Other

Extending Gault Principles: Current Kentucky Law

Case Type	Current Role of Counsel	Basis
Abuse/Neglect/Dependency Categorical Right	Guardian Ad Litem	KRS § 610.060(1)(a) <i>B.C. v. B.T.</i> , 182 S.W.3d 213, 217 (Ky. Ct. App. 2005)
Termination of Parental Rights Categorical Right	Guardian Ad Litem	KRS § 625.080(2) <i>Morgan v. Getter</i> , 441 S.W.3d 94, 109 n.6 (2014).
Custody Discretionary Appointment	Guardian Ad Litem	<i>Morgan v. Getter</i> , 441 S.W.3d 94 (2014)
Bypass of Parental Consent to Abortion By Request	Attorney	KRS § 311.732(3)(c)

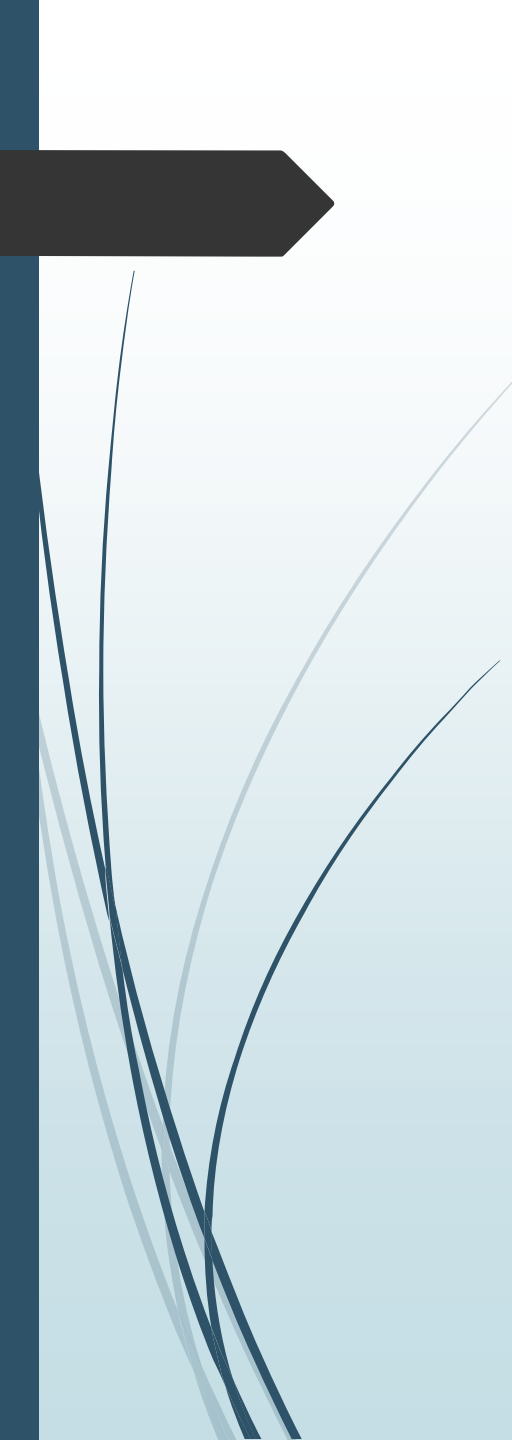
Extending Gault Principles: Current Ohio Law

Case Type	Role of Counsel	Basis
Abuse/Neglect/Dependency Qualified Right	GAL appointment; may be appointed counsel if not represented by parents' interests or if conflict between wishes and interests	R.C. § 2151.352; <i>In re Williams</i> , 805 N.E.2d 1110, 1111, 1113 (Ohio 2004); Juv. R. 4(C)(1)
Termination of Parental Rights Qualified Right	GAL appointment; may be appointed counsel if not represented by parents' interests or if conflict between wishes and interests	R.C. § 2151.352; <i>In re Williams</i> , 805 N.E.2d 1110, 1111, 1113 (Ohio 2004); Juv. R. 4(C)(1)
Paternity Qualified Right	Child must be appointed counsel if child's interests conflict with Mother's	R.C. § 3111.07(A)
Custody Discretionary Appointment	Guardian Ad Litem and Legal Counsel, if necessary	Civ. R. 75(B)(2)
DV/Order of Protection – Minor Respondents Discretionary Appointment	Attorney	R.C. § 2151.34(O)
Bypass of Parental Consent to Abortion Categorical Right	Attorney and GAL, may serve in both roles if no conflict	R.C. § 2151.85(B)(2)



Extending Gault Principles: Current Indiana Law

Right to Counsel	Role of Counsel	Basis
Abuse/Neglect/Dependency Discretionary Right	“counsel”	Ind. Code § 31-32-4-2(b)
Termination of Parental Rights Discretionary Right	“counsel”	Ind. Code § 31-32-4-2(b)
Bypass of Parental Consent to Abortion Categorical Right	Attorney	Ind. Code § 16-34-2-4(e)



Extending Gault Principles: The Need for Client-Directed Attorneys for Children Across Contexts

- ▶ Possible Constitutional Bases for Client-Directed Attorneys: First and Fourteenth Amendment Rights including Freedom of Association, Right to Family Integrity, Due Process Rights
- ▶ Client-Directed Attorneys Under the Rules of Professional Conduct: Rule 1.14
- ▶ ABA Standards of Practice for Lawyers Representing Children in Custody Cases: Child's Attorney or GAL; AAML Standards: Expressed-Wishes Attorney Only
- ▶ The New York Example: Traditional Attorney Unless Insufficient Capacity or Wishes are Likely to Result in Imminent Risk of Harm
- ▶ Other Rationales for Client-Directed Attorneys Across Contexts Post-*Gault*: Voice, Autonomy, Dignity
- ▶ Opportunities to Build on *Gault*

A dark blue arrow points right from the left edge of the slide. Below it, several thin, curved lines in shades of blue and grey sweep across the left side of the slide.

Questions?

Kim Tandy, ktandy@childrenslawky.org

Amanda Mullins Bear, abear@childrenslawky.org

Amy Halbbrook, halbrooka1@nku.edu